No. 14,671

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

GENEVIEVE PIERCE, CARRIE PIERCE MCCOY, ANNA PIERCE, RUTH CARMICHAEL, NEE URTON, MARCUS PETE, JR., AND ELIZABETH PETE, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

PERRY W. MORTON,
Assistant Attorney General.
LAUGHLIN E. WATERS,
United States Attorney,
Los Angeles, California.
ROGER P. MARQUIS,
JOHN C. HARRINGTON,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Cases:

Statutes:

Statutes—Continued

Miscellaneous:

In the United States Court of Appeals for the Ninth Circuit

No. 14,671

UNITED STATES OF AMERICA, APPELLANT

v.

GENEVIEVE PIERCE, CARRIE PIERCE MCCOY, ANNA PIERCE, RUTH CARMICHAEL, NEE URTON, MARCUS PETE, JR., AND ELIZABETH PETE, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court's Order for Findings and Judgment (R. 107-115) is reported at 123 F. Supp. 554. Its findings of fact and conclusions of law appear in the record at pp. 126-143.

JURISDICTION

The jurisdiction of the district court was invoked under the Act of August 15, 1894, 28 Stat. 305, as amended, 25 U. S. C. sec. 345 (codified as to jurisdictional provisions in 28 U. S. C. sec. 1353), and the

Declaratory Judgment Act, 28 U. S. C. sec. 2201. The judgment appealed from was entered September 30, 1954 (R. 144-148). A motion to amend findings and judgment was filed October 8, 1954 (R. 149-154), and was acted upon on December 1, 1954 (R. 155-156). Notice of appeal was filed by the Government on December 14, 1954 (R. 156-157).[1] The jurisdiction of this Court rests on 28 U. S. C. sec. 1291.

QUESTIONS PRESENTED

Invoking the Act of August 15, 1894, as amended, and the Declaratory Judgment Act, plaintiff Indians sought an adjudication that they were entitled to trust patents for lands which they had selected as allotments, the Secretary of the Interior having issued trust patents to other Indians for portions of the lands plaintiffs had selected. They also sought declarations, *inter alia,* that they were entitled to the income from the lands they had selected and that they were entitled to an equalization of allotments and the apportionment of the tribal waters. The district court affirmed the action of the Secretary in the issuance of trust patents for those lands as to which there were conflicting selections. But, although the Secretary had neither received nor denied any requests from plaintiffs for the equalization of allotments, the apportionment of water or the payment of the income derived from those portions of their selections as to which there were no conflicts, the district court assumed jurisdiction to make declarations in these

[1] The Government also filed a notice of appeal on November 29, 1954, but that appeal was dismissed on the ground that it was prematurely filed while the motion to amend findings and judgment was pending (R. 264-265). See *Segundo* v. *United States,* 221 F. 2d 296 (C.A. 9, 1955).

matters. On this appeal the following questions are presented:

1. Whether the district court had jurisdiction to determine such collateral matters.

2. Whether, assuming the jurisdiction existed, the district court erred in holding that plaintiffs were entitled to the income from the lands included in their nonconflicting allotment selections from the dates of their selections rather than from the dates of the issuance of trust patents.

3. Whether, assuming that jurisdiction existed, the district court erred in holding that it was the duty of the Secretary of the Interior and of the United States now to apportion and allot the tribal waters among the individual Indians.

STATUTES INVOLVED

1. The Act of August 15, 1894, 28 Stat. 286, 305, as amended by the Act of February 6, 1901, 31 Stat. 760, 25 U. S. C. sec. 345, is as follows:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdic-

tion to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him. * * *.

2. The jurisdictional portions of the Act of August 15, 1894, are codified as follows in 28 U. S. C. sec. 1353:[2]

> The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.
>
> The judgment in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him. * * *.

3. The Declaratory Judgment Act, 28 U. S. C. sec. 2201, provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any

---

[2] For the sake of simplicity the Act of August 15, 1894, as amended, 25 U.S.C. sec. 345, and the jurisdictional provisions as codified in 28 U.S.C. sec. 1353, will be referred to in this brief as the "1894 Act."

court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

This suit is a continuation of the litigation concerning the allotting of lands on the Agua Caliente Indian Reservation in Palm Springs, California. The background for the suit may be summarized as follows:

1. *Historical Background of the Palm Springs Reservation.*—The Secretary of the Interior refused to approve allotment selections made in 1927 by members of the Agua Caliente Band, and upon suit by 18 members of the band his action was upheld. *St. Marie* v. *United States,* 24 F. Supp. 237 (S. D. Cal., 1938), affirmed 108 F. 2d 876 (C. A. 9, 1940), certiorari denied because petition filed out of time, 311 U. S. 652 (1940). Thereupon, Lee Arenas, who had not been involved in the *St. Marie* litigation, filed an action to establish his right to an allotment. After the Supreme Court had reversed a summary judgment in favor of the United States (*Arenas* v. *United States,* 322 U. S. 419 (1944)), Lee Arenas was determined to be entitled to a trust patent allotment as selected by him in 1927. *Arenas* v. *United States,* 60 F. Supp. 411 (S. D. Cal., 1945), affirmed as modified, 158 F. 2d 730 (C. A. 9, 1946), certiorari denied, 331 U. S. 842 (1947). At the same time it was held that the *St. Marie* litigation was *res adjudicata* as to the rights of its participants to allotments pursuant to their 1927 selections. *Hatchitt* v. *United States,* 158 F. 2d 754 (C. A. 9, 1946).

2. *The Administrative Allotment of the Reservation.* —On April 8, 1948, the Secretary of the Interior directed the Commissioner of Indian Affairs to proceed with the allotment of the Agua Caliente Reservation and, in so doing, to prepare two allotment schedules: the first to include Indians listed on the 1927 schedule who were not parties to the *St. Marie* litigation, and the second to include all other living, duly enrolled members of the band, including the *St. Marie* group (R. 126, 194-196). A special allotting agent was appointed on July 21, 1948, but no instructions were given to him until September 24, 1948 (R. 127, 208-211). These instructions, issued by the Commissioner of Indian Affairs and approved by the Secretary of the Interior, provided that the allotting agent should follow the directions issued by the Secretary in the preceding April and that the allotments should be in the same acreages as those on the 1927 schedule, i. e., an "A" selection of a two-acre town lot or business site, a "B" selection of five acres of irrigable land, and a "C" selection of 40 acres of so-called nonirrigable or grazing land (R. 127-128, 205, 210). The instructions also authorized the allotting agent to reserve from allotment certain cemetery sites and ten acres on which the famous hot springs are located, but cautioned him that he should exercise great care in reserving from allotment, as he had suggested, lands in Andreas Canyon (the source of the reservation water supply), Palm Canyon and other scenic areas (R. 128, 203-205, 209-210). Such areas, it was stated, should be reserved only if (1) they were clearly needed for tribal purposes, (2) there was sufficient land otherwise available to provide allotments for all eligibles, and (3) the tribal committee and a majority of the adult members of the tribe consented (R. 128,

209-210). The allotting agent was also authorized, for the purpose of equalizing allotments, to increase the amount of grazing land in any selection (R. 205-207, 210).

On or about November 5, 1948, the allotting agent gave notice to all members of the tribe that allotment selections should be filed and he made available to them the forms "Request for an Allotment Selection" which had been approved by the Secretary (R. 24-25, 28-34, 128). By December 15, 1948, he had received 46 allotment selections on the prescribed forms, these selections being in addition to eight selections taken from the 1927 schedule and automatically listed on Schedule No. 1 (R. 128, 212-213, 236).

Meanwhile, the attorneys (hereafter called the Preston group) who had represented Lee Arenas in his litigation, and who subsequently were awarded attorney fees and were granted a lien on the Indian's allotment to secure payment of their award,[3] had taken upon themselves, without any authorization from the Interior Department, the function of preparing allotment selections and a schedule of allotments for the reservation (R. 218-222).[4] On December 18, 1948, they filed with the allotting agent the selections of 41 members of the band, each selection being accompanied by a grant of a power of attorney, not approved by the Secretary, to

---

[3] See *Arenas* v. *Preston*, 181 F. 2d 62 (C.A. 9, 1950), certiorari denied, 340 U.S. 819, and *United States* v. *Preston*, 202 F. 2d 740 (C.A. 9, 1953).

[4] These and other activities of the Preston group led to the filing of a suit in January, 1949 (*United States* v. *Oliver O. Clark, et al.*, Civil No. 9089-BH, S.D. Calif.), to enjoin them and associates from interfering with the administration of the reservation. A temporary injunction was issued and was continued by consent for approximately three years. The suit was dismissed on consent and without trial in February, 1953.

the Preston group (R. 129, 218-219). In addition, the Preston group forwarded to the Assistant Secretary of the Interior a schedule (referred to as the "Clark" schedule to distinguish it from official schedules) listing selections for the 41 members and additional members of the band (R. 4-6, 17-19, 75). Signed selections were not submitted in support of those additional selections listed in the Clark schedule and presumably they were arbitrary selections made by the attorneys without the approval or consent of the individual Indians (R. 41-43, 49-50, 52-55). This schedule purported to be approved by four of the five members of the tribal committee and by 17 of the adult members of the tribe (R. 220-221). Twenty-three of the Indians whose names appeared thereon had previously filed other selections with the allotting agent, and 19 of these 23 subsequently voluntarily ratified their original selections at the agency (R. 42, 43, 50-52, 219). The selections of 21 Indians made only through the Preston group were in conflict with the prior selections of 27 Indians who had filed their selections with the allotting agent in accordance with the instructions (R. 219-220). In addition, some of the selections on the Clark schedule included lands reserved from allotment, and some of the 40-acre grazing selections were for lands which had been classified as irrigable and subdivided into 5-acre tracts, thus being not available for selection as grazing lands (R. 202-203, 210, 228).

Those Indians who had filed selections through the Preston group which were in conflict with prior selections or in disregard of the land classifications were advised by the allotting agent that their selections were unacceptable and were given an opportunity to make other selections (R. 213). The plaintiffs in this action

elected to stand on their selections appearing on the Clark schedule (R. 222). During January, 1949, the allotting agent submitted to the Commissioner of Indian Affairs his Schedule No. 1, containing the eight selections which also appeared on the 1927 schedule, and Schedule No. 2, containing the selections for 46 Indians for whom there were no valid selections on the 1927 schedule (R. 211-217). These schedules, together with the Clark schedule, were considered by the Bureau of Indian Affairs and the Department of the Interior (R. 217-231). In February, 1949, the Department declined to approve the Clark schedule, approved Schedule No. 1 in its entirety, approved 19 selections on Schedule No. 2 which did not conflict with any selections on the Clark schedule, and held the remaining 27 selections in abeyance (R. 226-228). At the same time the Secretary approved reserves totalling approximately 2,590 acres, which had been listed on Schedule No. 2, including reserves in the canyons which the allotting agent had been cautioned he should not reserve from allotment unless the tribe consented (R. 214-215, 224-227). At this time the tribal committee had neither approved nor disapproved the reserves, but subsequently disapproved them (R. 224).

In acting on the various schedules, the Secretary directed the allotting agent to proceed with the completion of the allotment program by requiring that the 21 Indians on the Clark schedule whose selections were in conflict or otherwise objectionable show cause why their selections should not be rejected (R. 228-230). He also pointed out that the appraised values of the scheduled allotments ranged from $17,100.00 to $164,740.00 and instructed the agent that those living members with low value allotments should be permitted to make addi-

tional selections to raise the values of their allotments to a suggested range of from $100,000.00 to $110,000.00, but that such equalization should be deferred until all pending selections had been adjusted (R. 230-231).

In response to show cause orders the 21 Indians whose selections were objectionable urged through their attorneys, among other things, that the conflicts should be resolved by application of a rule giving priority to birth date rather than date of selection (R. 234). The suggestion was rejected and, when the allotting agent announced that he intended to proceed according to his instructions, these Indians in April, 1949, appealed to the Secretary (R. 233). In May, 1949, the allotting agent resubmitted Schedule No. 2 with the recommendation that the remaining 27 selections be approved and submitted a new Schedule No. 3 containing selections for the 21 Indians who had filed selections only through the Preston group (R. 232-241). In making up this latter schedule, the agent allowed any portions of their previous selections which were not objectionable and made lieu selections of lands as close in value as possible to the value of the rejected selections (R. 233). On February 1, 1950, the Secretary affirmed the action of the allotting agent in rejecting the 21 conflicting selections, approved the balance of the selections on Schedule No. 2, and ordered that the 21 Indians should either accept the selections made for them on Schedule No. 3 or make lieu selections (R. 26). Trust patents were issued for the approved selections (R. 129-132).

3. *The Present Litigation.*—The seven plaintiffs (Clemente Segundo, Carrie Pierce McCoy, Genevieve Pierce, Ruth Carmichael, nee Urton, Marcus Pete, Jr., Elizabeth Pete, and Anna Pierce) elected to stand on their selections made through the Preston group (R.

27), and on July 10, 1950, they instituted the present action on their own behalf and purportedly on behalf of all members of the band similarly situated, invoking the court's jurisdiction under the 1894 Act as amended and codified and the Declaratory Judgment Act (R. 3). The complaint sought an adjudication that the plaintiffs and other members of the band were entitled to trust patents for allotments as shown on the Clark schedule and to the income derived from such lands from the date their selections had been filed, and that any trust patents in conflict with the selections on the Clark schedule were null and void (R. 12-13, 39). In addition the complaint prayed for declarations (1) that the plaintiffs and other Indians were entitled to have the waters on the reservation apportioned in a reasonable manner for use on the allotted lands; (2) that they were entitled to have made in respect to every allotment a reasonable provision for easements for flood control channels, streets and utility lines; (3) that the orders withdrawing lands in Andreas Canyon and the Village Trailer Court from availability for selection were invalid; and (4) that the Secretary's order limiting selections for allotments to seven acres in Section 14 and to five acres in Section 22 was invalid (R. 13-15). The individual Indians who had received trust patents for the lands claimed by plaintiffs were made parties defendant and several of them filed answers (R. 34-36, 40-57).

In its answer the United States acknowledged that the district court had jurisdiction to determine the plaintiffs' rights to trust patents for the lands claimed by them but denied that they were so entitled insofar as the conflicting selections were concerned, and also denied that there was any jurisdiction to make decla-

rations as to the accounting for income, apportionment of water, equalization of allotments, etc. (R. 21-28, 75-76). In a pre-trial order the court ruled that it had jurisdiction under the 1894 Act to adjudicate all controversies between the Secretary and the Indians relating to their rights to an allotment, including jurisdiction to decree the precise nature and extent of all water rights appurtenant to allotments of tribal land (R. 77-78).

After trial the district court concluded that there was no basis for considering the suit to be a class action inasmuch as the seven plaintiffs could not represent the unjoined members of the band because of conflicting interests and, the membership being relatively small, all could be joined as parties (R. 143). The court also concluded that priority in selection was controlling in resolving conflicting claims to allotments and that the Secretary had not abused his discretion in restricting the acreage that could be selected in the developed portions of the reservation (R. 137-138, 139). Thus, the judgment below denied the claims of plaintiffs insofar as their selections were in conflict or in excess of the limitations as to quantities and affirmed the validity of the trust patents which had been issued to the individual defendants (R. 145, 147). The court also found and adjudged that the Secretary had adopted and was executing a comprehensive plan for easements for flood control, streets and public utilities and that he had not abused his discretion in granting or refusing to grant such easements (R. 133-134, 141-142, 145). And, because none of plaintiffs had selected allotments in any of the areas reserved from allotment, the court concluded that the validity of the withdrawal orders

should not be determined (R. 140). Three of plaintiffs (Genevieve Pierce, Carrie Pierce McCoy and Anna Pierce) appealed from the portions of the judgment above described, but, after they had decided either to accept the selections made for them by the allotting agent or to make lieu selections, their appeal was dismissed upon stipulation, thus concluding all disputes as to allotments as such and leaving for consideration only the Government's appeal from those parts of the judgment now to be discussed, relating to collateral issues.[5]

4. *The Issues on the Present Appeal.*—The portions of the allotments represented by the 2-acre and 5-acre selections of Carrie Pierce McCoy and Annie Pierce and the 5-acre selection of Genevieve Pierce were not objectionable in any way. However, trust patents had not been issued for these selections because it was the practice to issue but one trust patent covering the three types of selections (R. 165-166). Neither plaintiffs nor their attorneys up to the time of trial had made a written or even oral request that trust patents be issued for the nonconflicting selections (R. 166-167, 172). And although the matter of the payment of the income derived from the nonconflicting selections had been taken

[5] While this case was pending in the district court, the allotment selections of the other plaintiffs were adjusted as follows. Clemente Segundo appeared on both Schedule No. 2 and the Clark schedule. He elected to take his nonconflicting selection appearing on Schedule No. 2, and a trust patent was issued in February, 1950 (R. 129). He subsequently died and the action was dismissed as to him on January 24, 1952 (R. 37). Ruth Carmichael made lieu selections and a trust patent was issued therefor, but she refused to accept the trust patent (R. 133). Marcus Pete, Jr., and Elizabeth Pete also made lieu selections and accepted trust patents for such selections (R. 133). The court ordered that the trust patents for these three Indians be confirmed (R. 138-139, 147).

up orally and in writing with officials of the Department of Justice and orally with officials of the Department of the Interior, no written request was made to the Department of the Interior as was suggested to them (R. 173-174, 175-176, 192-193).[6] As to these nonconflicting selections, the court concluded that the equitable title had vested in plaintiffs as of the date of selection on December 18, 1948, and that plaintiffs were entitled to the income derived from such land from that time (R. 129, 135, 139-140). Hence, the judgment declared that the United States must account to these plaintiffs for such rental income from December 18, 1948, and retained jurisdiction to effectuate this portion of the judgment (R. 146, 147-148).

The instructions to the allotting agent referred to the necessity of equalizing the value of allotments by permitting Indians who had selected allotments of comparatively low value to make additional selections, but directed that such additional selections should be deferred until all pending selections were adjusted and primary allotments made (R. 205-206, 210, 230-231). At the trial officials of the Bureau of Indian Affairs testified that the equalization process was deferred pending the outcome of this litigation (R. 169-171, 174-175). There was no indication in the pleadings or evidence that plaintiffs or any other member of the band had made any specific "equalization" selections which had been denied. Nevertheless, the district court, as-

---

[6] Upon written request by plaintiffs after the trial was concluded trust patents were issued for the nonconflicting selections on March 23, 1954, prior to final submission of the case. The plaintiffs have themselves been collecting the rentals due and payable since that date, and the Government has paid over to Genevieve Pierce and Annie Pierce that portion of the rentals previously received which was attributable to the period beginning on March 23, 1954.

suming jurisdiction of the equalization issue, found and concluded that it was the duty of the Secretary of the Interior to conduct further allotment proceedings so that when the allotment and equalization process is completed each plaintiff will have been allotted land of as nearly equal value as practicable to the land allotted to each of the other members of the tribe (R. 135-136, 140). The judgment provided that plaintiffs could make additional selections from any lands available for allotment and that the United States should allot to each total lands of approximately equal value to the lands allotted to others (R. 146-147). Jurisdiction was reserved to effectuate this part of the judgment (R. 147-148).

The third issue arises from the fact that the principal sources of water for the reservation are Andreas Canyon and Tahquitz Canyon (R. 178, 245-246). At least since 1906 the Government has assisted the Indians in developing water for irrigation and has maintained two distribution systems for their use (R. 177-182; Plaintiffs' Original Exhibit No. 83, pp. 7-12). The Secretary of the Interior has not adopted any regulations with respect to the distribution of the water on the reservation (R. 164). Instead, since 1942 the actual distribution of water has been under the control of the tribal committee which has established schedules for the use of water (R. 177, 180, 182-183, 259). There have been no complaints from any of the Indians as to a shortage of water (R. 171-172). Surveys were made during 1949 by two water engineers (one employed by the Government and one employed by the Preston group) with respect to the development of an additional water supply for irrigation and do-

mestic purposes, the plan proposed by the government engineer being estimated to cost $500,000.00 (R. 242-254; Plaintiffs' Original Exhibit No. 70). But the Secretary has not adopted any plan for the transmission of such additional water from the sources where it may be developed (R. 183-184). The district court found and concluded that the Secretary was remiss in the performance of his duty imposed by Section 7 of the General Allotment Act of February 8, 1887, 25 U.S.C. sec. 381,[7] to allot water rights appurtenant to allotted lands, and that all members of the tribe, if practicable, should be joined as parties to any action for equitable apportionment of the water rights appurtenant to the allotted lands (R. 134, 142-143). The judgment declared that the right to a just share of the tribal waters is appurtenant to each allotment of tribal lands, and that plaintiffs are entitled to have apportioned and it is the duty of the United States to apportion the tribal waters in such manner as will secure for each plaintiff a just share of such waters (R. 145). Jurisdiction was reserved to effectuate the judgment in this respect (R. 147-148).

Jurisdiction was also retained for the purposes of determining the right of plaintiffs' attorneys to receive reimbursement for their expenses and compensa-

---

[7] That Section provides:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

tion for their services, fixing the amount, and securing payment of the same (R. 148). The attorneys for plaintiffs filed a motion alleging that the adjudication as to water rights and equalization of allotments affects every allotment and inures to the benefit of each member of the band and requesting (1) an order permitting each member of the tribe who received an allotment subsequent to those of Lee Arenas and Eleuteria Brown Arenas to be made parties; (2) an order permitting the attorneys to present the question as to their right to compensation for services rendered and expenses advanced for each of such allottees; and (3) an order amending the findings and judgment to permit consideration of the above questions (R. 150-151). The district court ordered that, if and when it shall become necessary for the court to take steps to effectuate any part of its judgment, plaintiffs may apply for an order permitting other members of the tribe to be made parties, and that the attorneys may present at an appropriate time their petitions for compensation for services rendered and for reimbursement for expenses advanced in this action (R. 155-156). In all other respects the motion was denied without prejudice to renewal (R. 156). In this connection it is to be noted that in December, 1951, the attorneys filed in the land records of Riverside County, California, a Notice of Pendency of Action, giving notice that the judgment to be entered in this action might affect virtually all of the lands on the reservation and that if judgment is for the plaintiffs, the attorneys might apply to the court for an equitable lien upon such lands for the value of legal services performed and costs incurred in the action and also for the value of legal services

previously performed for the Indians with respect to the allotment of their lands (R. 81, 87-92). Because of the filing of this notice of *lis pendens* it has been impossible to sell any of the lands covered by the notice without first obtaining a waiver from the attorneys (R. 95-106). A motion to quash the notice was filed in the instant case, but, although argued, the motion has not been acted upon (R. 79-81, 93-94).

More recently, on July 27, 1955, the attorneys filed a motion seeking joinder of all the Indians except Lee Arenas and Eleuteria Brown Arenas for the purpose of securing an award for compensation and expenses against each of them.

SUMMARY OF ARGUMENT

I

A. Since the Declaratory Judgment Act does not enlarge the jurisdiction of the Federal courts, the jurisdiction of the district court must be found in the 1894 Act or not at all.

B. There was no dispute between the Secretary and plaintiffs as to their right to trust patents for those portions of their selections as to which there were no conflicting selections. Therefore, it is the Government's contention that when the district court determined that plaintiffs were not entitled to those portions of their selections which had been denied by the Secretary because of conflicts, its jurisdiction under the 1894 Act was exhausted. For the jurisdiction conferred by the Act is not unlimited. It does not authorize the settlement of controversies concerning the allotment policy and the management of allotted lands. Nor does it authorize the adjudication of controversies in the abstract.

Rather, the jurisdictional prerequisite for any action under the Act is the existence of a specific allotment selection which has been *unlawfully denied* by the Secretary. Thus, inasmuch as the district court held that the Secretary had not unlawfully denied the conflicting selections and inasmuch as the Secretary had approved rather than denied the nonconflicting selections, there is no basis for the adjudication of such collateral issues as the right to income pending issuance of a patent, to equalization of allotments or to the apportionment of tribal water. For there was no controversy in these matters which in itself was justiciable under the 1894 Act. If, as plaintiffs asserted and the district court found, the Secretary failed or refused to perform his duties in these respects, the proper remedy, if any, would be an action in mandamus against the Secretary rather than the present suit.

C. Inasmuch as there was no controversy as to plaintiffs' rights to their nonconflicting selections, there could be no jurisidction to determine their collateral rights to the income from the lands included in such selections. Moreover, it is plain that there is no such jurisdiction because the judgment in this respect contemplates, contrary to the provisions of the Act, an eventual money judgment against the United States. In addition this issue could not be adjudicated in the absence of an indispensable party, the tribe itself, which also had a substantial claim to the beneficial ownership of the income.

D. The Declaratory Judgment Act was the sole basis for the court's assumption of jurisdiction to declare that plaintiffs were entitled to an apportionment of the tribal water. But that Act can not be the basis of

jurisdiction. And since there was no allegation or evidence that the Secretary had denied a request for a specific allocation of water, but only that the Secretary had failed to take any steps to apportion water rights, it is clear that if plaintiffs are entitled to any relief in the premises, the remedy is in a mandamus action. Moreover, since the policy of Congress has been not to "allot" water when allotting lands, the assumption of jurisdiction is erroneous as an invasion of the field of determination of questions of Indian land policy.

E. We agree that plaintiffs and the other members of the tribe have a right to equalization of allotments. But in the absence of a denial of specific "equalization" selections, there is no jurisdiction to adjudicate the question.

F. Inasmuch as the assumption of jurisdiction to adjudicate questions as to income, equalization of allotments and apportionment of water is in fact detrimental to the interests of the Indians, it cannot be sustained on a theory of construing the 1894 Act favorably to the Indians.

II

Even assuming the existence of jurisdiction to adjudicate the question as to the right to income, the court erred in concluding that plaintiffs rather than the tribe were entitled to the disputed income. The tribe's right to the income prior to the issuance of the individual trust patents is established by the provisions of the pertinent allotting statutes. And the cases relied upon by the district court are distinguishable because of differences in the allotting statutes there construed.

III

Section 7 of the General Allotment Act did not, as the district court held, impose any duty to "apportion" or "allot" the tribal water, the only duty being one of "distribution". Moreover, it is plain that the Secretary was not remiss in his duty whether it be considered one of "distribution" or "apportionment".

ARGUMENT

I

The District Court Had No Jurisdiction to Make Declarations as to the Indians' Rights to an Accounting for Income, the Equalization of Allotments, or the Apportionment of Tribal Water

A. *The Declaratory Judgment Act does not enlarge the jurisdiction of the federal courts.*—Plaintiffs invoked the jurisdiction of the court below under the Declaratory Judgment Act (28 U.S.C. sec. 2201) as well as the 1894 Act (R. 3), and in holding that it had jurisdiction to declare that a right to a just share of tribal waters is appurtenant to an allotment of tribal land, the court relied solely upon the Declaratory Judgment Act (R. 77, 142). But it is now well settled that "the operation of the Declaratory Judgment Act is procedural only" (*Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240 (1937)), and that by the Act "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co.* v. *Phillips Co.,* 339 U.S. 667, 671 (1950); *Commercial Casualty Ins. Co.* v. *Fowles,* 154 F. 2d 884, 885 (C.A. 9, 1946); *West Pub. Co.* v. *McColgan,* 138 F. 2d 320, 323-324 (C.A. 9, 1943). More specifically, the Act did not

extend the consent of the United States to be sued. *Love* v. *United States,* 108 F. 2d 43, 50 (C.A. 8, 1939), certiorari denied, 309 U.S. 673. It follows, therefore, that the jurisdiction of the court below must be found in the 1894 Act or not at all.

B. *The jurisdiction conferred by the 1894 Act is not unlimited.*—It is clear that the 1894 Act is a consent that the United States may be sued concerning an Indian's right to a particular allotment of land. *Arenas* v. *United States,* 322 U.S. 419, 430 (1944). This court has also construed the Act as a consent that in such a case the federal court may exercise its general equity powers and impress a lien upon the allotment to secure the payment of attorney fees. *Arenas* v. *Preston,* 181 F. 2d 62 (C.A. 9, 1950), certiorari denied, 340 U. S. 819; *United States* v. *Preston,* 202 F. 2d 740, 741 (C.A. 9, 1953). But even the attorney fee cases do not support the district court's conclusion (R. 77-78, 141-143) that under the 1894 Act it had jurisdiction to settle any and all controversies between the Secretary of the Interior and the Indians which in any way affected their allotments. As we shall now show, such a conclusion is not supported by the various decisions in the *Arenas* litigation and, indeed, is in conflict not only with other authorities closer in point but even with interpretations as to the scope of the statutory consent in this Court's and the Supreme Court's opinions relating to the Agua Caliente Reservation.

At the time the Indian plaintiffs instituted this action their situation with respect to their allotment selections was as follows: portions of their selections had been denied by the Secretary of the Interior because they were in conflict with the prior selections of other Indians or

were in excess of the acreage limitations as to lands classified as irrigable (R. 26). In place of those portions which had been denied, plaintiffs had been given the choice of either accepting selections made on their behalf by the special allotting agent or themselves making lieu selections (R. 26-27). They chose to stand on their selections which had been denied (R. 27). There was no dispute with the Secretary as to their entitlement to the other portions of their selections which were not objectionable in any way, but the issuance of trust patents covering such portions was held up pending completion of their selections so that one trust patent could be issued to each Indian (R. 165-166). The Government has always acknowledged that the district court had jurisdiction to determine whether or not plaintiffs were entitled to the selections which were rejected by the Secretary. But it is the Government's contention under the circumstances that when the district court determined that issue adverse to plaintiffs, its jurisdiction under the 1894 Act was exhausted and that it had no authority to adjudicate the other claims asserted by the plaintiffs. The primary basis for the Government's contention is that as to those claims there was no justiciable controversy between the Secretary and the Indians, in that the Secretary had not denied the nonconflicting portions of their selections and had not denied any request by plaintiffs for the payment of income, the apportionment of water, or the equalization of allotments. Plainly, the Government's contention should have been sustained.

The limited nature of the jurisdiction conferred by the 1894 Act is clear. For example, it confers no jurisdiction to determine questions of heirship in connection

with a claim to an allotment by an Indian as the heir of an allottee, since exclusive jurisdiction to determine heirship is vested in the Secretary of the Interior. *First Moon* v. *White Tail,* 270 U.S. 243 (1926); *Arenas* v. *United States,* 197 F. 2d 418 (C.A. 9, 1952). It has also been held that a jurisdictional prerequisite to judicial action under the Act is the existence of a specific allotment selection which has been improperly denied by the Secretary. *Reynolds* v. *United States,* 174 Fed. 212, 213-215 (C.A. 8, 1909). In other words, the Act does not permit the adjudication of assumed controversies *in vacuo.* And it does not authorize the settlement of controversies concerning the allotment policy and the management of allotted lands. *United States* v. *Eastman,* 118 F. 2d 421, 423 (C.A. 9, 1941), certiorari denied, 314 U.S. 635;[8] *Kennedy* v. *Public Works Administra-*

---

[8] In the *Eastman* case several allottees sued the United States and its officials to enjoin the enforcement of regulations concerning the sale of timber on their allotments. This Court held that the United States should have been dismissed as a party because the 1894 Act was "intended merely to authorize suits to compel the making of allotments in the first instance." 118 F. 2d at p. 423. In *Gerard* v. *United States,* 167 F. 2d 951, 954 (C.A. 9, 1948), this Court held that the Act also authorized suits to determine an Indian's right to an allotment for which he had been given a trust patent but which had been sold at a tax sale after the Secretary of the Interior had issued a fee patent without the Indian's consent. In so holding this Court stated: "* * * what we said in the Eastman case in connection with dismissing the United States is not controlling here." 167 F. 2d at p. 954. Obviously, this statement does not affect the further language in the *Eastman* case (118 F. 2d at p. 423) indicating that the 1894 Act should not be extended to authorize judicial review of every aspect of the administration of Indian lands and allotments. In other words, the *Gerard* case is not a holding that jurisdiction under the 1894 Act extends beyond the determination of an Indian's right to an allotment.

tion, 23 F. Supp. 771, 773-774 (W.D. N.Y. 1938). As the Supreme Court said in *Arenas* v. *United States,* 322 U.S. 419, 432 (1944), the Act requires the courts to "render a judgment which will stand in lieu of the Secretary's action if he has *unlawfully denied* a patent to an allotment to which the Indian is entitled. But courts are not to determine questions of Indian land policy * * *." [Emphasis by the Court.]

Thus, it is clear that when the district court affirmed the Secretary's denial of the conflicting portions of plaintiffs' selections (R. 138, 145, 147), its jurisdiction ended. The exercise of further jurisdiction could not rest upon plaintiffs' claim to the conflicting selections since, as the court found, those selections had not been *"unlawfully denied."* Neither could it rest upon the nonconflicting selections, for they had not been denied at all. And there is no other jurisdictional basis, for none of plaintiffs had made an "equalization" selection or a request for the payment of rental income or for a definite allocation of water upon which the Secretary could have acted. Indeed, a mere reading of those portions of the judgment dealing with these matters reveals that they are simply declarations of abstract rights. In this respect the judgment could not, as required by the 1894 Act, "have the same effect * * * as if such allotment had been allowed and approved" by the Secretary. Quite obviously, the Act does not permit such advance declarations of abstract and indefinite rights. *Muskrat* v. *United States,* 219 U.S. 346 (1911); *Ashwander* v. *Valley Authority,* 297 U.S. 288, 324-325 (1936).

The district court based its jurisdiction largely upon its conclusions that the Secretary had been remiss in his

duties to equalize allotments and apportion water (R. 134, 142-143). But even if such conclusions were correct,[9] it does not follow that the court could provide relief pursuant to the 1894 Act. For if the Secretary was refusing or failing to take action in the respects complained of, it is plain that the proper remedy was a mandamus action against the Secretary rather than the instant suit. *Virginian Ry.* v. *Federation,* 300 U.S. 515, 551 (1937). Indeed, the district court recognized that mandamus, not a suit under the 1894 Act, was the proper method to attack inaction by the Secretary when, in holding that plaintiffs could not rely upon selections allegedly made before the allotment procedure was established, it reasoned that mandamus was the proper remedy to compel action (R. 137). By the same reasoning, the court should have determined it had no jurisdiction beyond the determination of whether or not plaintiffs were entitled to trust patents for the lands as to which there were conflicting selections.

Because of limitations of the 1894 Act the district court had no jurisdiction to pass upon any of the matters of which the Government here complains. We shall now show that for detailed reasons applicable to the individual issues the district court had no jurisdiction to make declarations with respect to the rights of

---

[9] We submit that the "findings of fact" to this effect were erroneous. It is undisputed that the Secretary had outlined the procedure for equalization of allotments, but he had directed that the process of equalization should be deferred until the adjustment of the conflicting selections (R. 230-231). Such direction was not only reasonable but necessary, since it would be impossible to equalize until the basic allotments were stablized. We shall later demonstrate, *infra*, pp. 42-44, that the finding as to the apportionment of water was due to a misunderstanding as to the nature of the Secretary's duty.

the plaintiffs to an accounting for income, the apportionment of water, or the equalization of allotments.

C. *The 1894 Act conferred no jurisdiction to make a declaration as to plaintiffs' rights to the income from the lands included in their nonconflicting selections.*— The Secretary of the Interior has not denied those portions of plaintiffs' selections which were not in conflict with the selections of others but, rather, has approved them as they appeared on Schedule No. 3, the only official schedule containing plaintiffs' selections, subject only to the condition that plaintiffs voluntarily elect to accept them (R. 26). Even up to the time of trial plaintiffs had never requested the Secretary to issue trust patents for their nonconflicting selections (R. 166-167, 172). Hence, for the reasons we have already discussed (*supra,* pp. 22-26), it is clear that there was no controversy with respect to the nonconflicting selections which was justiciable under the 1894 Act. And that being so, it is likewise clear that there could be no jurisdiction with respect to plaintiffs' claims for the income from such nonconflicting selections. In other words, not even the broadest application of the concept that by the 1894 Act Congress intended the courts "to fully exercise their general equitable jurisdiction" (see *Arenas* v. *Preston,* 181 F. 2d 62, 67 (C. A. 9, 1950), certiorari denied 340 U. S. 819) is an aid to jurisdiction here, since there is not the basic jurisdiction to make any adjudication concerning the Indians' rights to the nonconflicting selections upon which their rights to income depend. And there can be no other basis for a conclusion that there is jurisdiction to make an adjudication as to the Indians' right to income. In addition to the fact that plaintiffs have not made a request for payment which the Secre-

tary could deny (R. 173-174, 175-176, 192-193), jurisdiction is also foreclosed in this respect by the fact that the question of who is entitled to the income is separate and distinct from the question whether an Indian is entitled to a particular allotment. The income question is more a matter of administration of the allotment, a question which is not submitted to the courts by the 1894 Act. Cf. *United States* v. *Eastman,* 118 F. 2d 421, 423 (C. A. 9, 1941), certiorari denied, 314 U. S. 635.

These reasons, we submit, clearly demonstrate that the district court lacked jurisdiction to make any adjudication as to plaintiffs' right to income from their nonconflicting selections. But we need not rest our case here. The judgment provides that plaintiffs are entitled to all the income derived from the lands included in their nonconflicting selections from the date on which their selections were filed, that the United States is required to account to plaintiffs for such income, and that jurisdiction was retained to effectuate the judgment in this respect. Obviously, this portion of the judgment contemplates an eventual money judgment against the United States or at least a statement of a balance due, which, in view of the sovereign immunity from execution, is the same thing as a money judgment against the United States. But, as this Court has already held, the 1894 Act does not authorize a money judgment against the Government. *United States* v. *Arenas,* 158 F. 2d 730, 753 (C. A. 9, 1946), certiorari denied, 331 U. S. 842.

Moreover, the United States did not assert any beneficial ownership of the income, but instead contended that it held the moneys in trust for either the tribe or the individual Indians and was willing to make pay-

ment to the rightful owner. Consequently since the claim of the tribe is, to say the least, a substantial one (see *infra,* pp. 36-42), it was an indispensable party to any adjudication of this issue. *Arenas* v. *United States,* 197 F. 2d 418, 420 (C. A. 9, 1952); *United States* v. *Fairbanks,* 171 Fed. 337, 338-339 (C. A. 8, 1909), affirmed 223 U. S. 215, 226 (1912). Since it was not and could not be made a party to the suit (*United States* v. *United States Fidelity Co.,* 309 U. S. 506, 512-513 (1940)), it is clear that for the lack of a necessary party, in addition to the other reasons already discussed, there was no jurisdiction to determine plaintiffs' right to the disputed income. And certainly the 1894 Act did not contemplate the interpleader of the Indian tribe of which the plaintiffs were members in order to settle its rights.

D. *The 1894 Act conferred no jurisdiction to determine plaintiffs' rights to an apportionment of water.*— The judgment declares in part that a right to a just share of the tribal waters is appurtenant to and accompanies each allotment of tribal lands, that it is the duty of the United States to apportion the waters upon the reservation in such manner as will secure for each plaintiff a just share of the tribal waters, and that jurisdiction is retained to effectuate the judgment in this respect (R. 145, 147). This portion of the judgment flowed from the court's conclusion that it had jurisdiction under the Declaratory Judgment Act to make such a declaration as to the right to water (R. 77, 142).[10]

---

[10] The district court also concluded that, whenever it appears that the Secretary has failed to perform his duty to prescribe rules and regulations for the distribution of water among the Indians, the court has jurisdiction under the 1894 Act "to adjudicate the resulting controversy between the Secretary and the allottees, by decreeing the precise nature and extent of all water rights ap-

But, as we have already shown (*supra,* pp. 21-22), the Declaratory Judgment Act can not be the basis for jurisdiction. And it is plain that under the circumstances jurisdiction was not conferred by the 1894 Act. The complaint contains no allegation and there was no evidence that the Secretary had denied a request by any of plaintiffs for an allocation of a specified amount of water. Rather the only allegation, and the court found and concluded that it was supported by the evidence, was that the Secretary was remiss in the performance of the duty imposed by law in that he had failed to allot water rights (R. 8, 134, 143). Obviously, the proper remedy for such alleged failure on the part of the Secretary was a mandamus action against the Secretary rather than a suit against the United States under the 1894 Act (*supra,* pp. 25-26). And the only appropriate judgment in such a mandamus suit would be a direction to the Secretary to act in the matter and not, as here, an undertaking by the court to do what it may think the Secretary should have done. While this reasoning by itself demonstrates the lack of jurisdiction, there are other reasons why it was error for the district court to assume jurisdiction to adjudicate water rights.

It is not disputed here that the water on the Agua Caliente Reservation is reserved and held in trust by the United States "for the equal benefit of tribal members." *United States* v. *Powers,* 305 U.S. 527, 532-

---

purtenant to and accompanying allotments of tribal land" (R. 142-143). And, having reserved jurisdiction to effectuate its judgment (R. 147), the court apparently intends to proceed in making such a decree if the Secretary fails to apportion the tribal waters to the satisfaction of the court. It follows that if the court had no jurisdiction to make the limited declarations it did, there would likewise be no jurisdiction to decree "the precise nature and extent of all water rights" on the reservation.

533 (1939); *Winters* v. *United States,* 207 U. S. 564, 576-577 (1908). "Being reserved no title to the waters could be acquired by anyone except as specified by Congress." *United States* v. *McIntire,* 101 F. 2d 650, 653 (C. A. 9, 1939); *United States* v. *Alexander,* 131 F. 2d 359, 360 (C. A. 9, 1942). For "since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority." *Sioux Tribe* v. *United States,* 316 U. S. 317, 326 (1942). But while directing the allotment of the "lands" on the Agua Caliente Reservation, Congress has never provided that the water resources of the reservation be "allotted." See Mission Indian Act of January 12, 1891, 26 Stat. 712, as amended by the Act of March 2, 1917, 39 Stat. 969, 976; General Allotment Act of February 8, 1887, 24 Stat. 388, as amended by the Act of June 25, 1910, 36 Stat. 855. And, since Congress has not specifically authorized it, the Secretary cannot even insert in the trust patent any provision respecting the Indian's right to the use of water. *Deffeback* v. *Hawke,* 115 U. S. 392, 406 (1885); *Burke* v. *Southern Pacific R. R. Co.,* 234 U. S. 669, 696-701 (1914).

Indeed, rather than authorizing any apportionment of water it is clear that Congress has adopted a policy of refraining from doing so until the establishment of an irrigation project and then restricting the attempt at allocation to such an indefinite amount as "a right to so much water as may be required to irrigate such lands." Act of May 29, 1908, 35 Stat. 444, 448-450; see *United States* v. *McIntire,* 101 F. 2d 650, 653-654 (C. A. 9, 1939). And, in the event that the supply of water

is insufficient to furnish the required amount, then the provisions of section 7 of the General Allotment Act (Act of February 8, 1887, 24 Stat. 388, 25 U. S. C. sec. 381) become applicable and authorize the Secretary of the Interior to prescribe regulations to secure a "just and equal distribution" of the tribal water. *United States* v. *McIntire,* 101 F. 2d 650, 654 (C. A. 9, 1939). Thus, at every stage Congress has established procedures independent of the procedures for the allotment of lands, for the protection of the individual Indian's right to a fair and just share of the tribal water. Obviously, in assuming jurisdiction to apportion the tribal waters, the district court entered into the field of the determination of questions of Indian land policy. The 1894 Act conferred no such authority. *Arenas* v. *United States,* 322 U. S. 419, 432 (1944).[11] Finally, no proof is needed to establish the fact that water right litigation produces one of the most complicated and extended types of cases there are (see *infra,* pp. 35-36). It is absurd to suppose that Congress intended that a suit under the 1894 Act should develop into such a case.

E. *The 1894 Act conferred no jurisdiction to make declarations as to plaintiffs' rights to the equalization of allotments.*—The district court found that plaintiffs were entitled to total lands of approximately equal value to the lands allotted to each of the other members of the tribe, and that it was the Secretary's duty to conduct further allotment proceedings so that when the al-

[11] The assumption of jurisdiction to apportion tribal waters is not only erroneous but is wholly unnecessary for the protection of the right of the individual Indian to the use of a fair and just portion of the water. For even though his patent is silent as to his water rights, and even though his allotment is outside the area to be served by a reservation irrigation project, an Indian is nevertheless entitled to the use of a fair and just portion of the tribal water. *United States* v. *Powers,* 305 U.S. 527, 531-533 (1939).

lotment and equalization process is completed each plaintiff would have allotments as nearly equal in value as practicable to the value of the allotments of others (R. 135-136, 140). The judgment provided that plaintiffs were entitled to their just and equitable share of the tribal lands, that each was entitled to make further selections, and that the United States shall allot to each total lands of approximately equal value to the lands allotted to the other members of the tribe (R. 146-147).

We do not now and never did in any way dispute the right of the plaintiffs and all other members of the tribe to such equalization of allotments. But we do contend that the 1894 Act did not authorize the court to so intrude into the administrative functions. Under the allotting instructions the process of equalization was to be deferred until after the primary allotments had been stabilized (R. 230-231). And none of plaintiffs or any other members of the tribe had made a request for any specific land for equalization purposes, so that, of course, the Secretary had not denied any such request. Thus, any declaration by the court as to the right to equalization is made *in vacuo* and in the absence of any controversy. Such jurisdiction is not conferred by the 1894 Act. *Reynolds* v. *United States,* 174 Fed. 212 (C.A. 8, 1909); see *supra,* pp. 22-26.

Basically the error below is the same as that when review of an administrative ruling is undertaken before the administrative remedies have been exhausted. Cf. *Myers* v. *Bethlehem Corp.,* 303 U.S. 41, 50-52 (1938); *Allen* v. *Grant Cent. Aircraft Co.,* 347 U.S. 535, 553 (1954).

F. *The assumption of jurisdiction has been injurious rather than beneficial to the Indians and hence cannot be sustained on a theory of construing the statute fa-*

vorably to the Indians.—Only seven of the 76 or so members of the Agua Caliente Band joined as plaintiffs in this action, and of the seven several adjusted all their differences with the Government before the case went to trial. Apparently the great majority of the tribe was satisfied with the Secretary's management of the reservation with respect to the equalization of allotments and the apportionment of water. Indeed, 16 members were aligned with the United States as defendants because they had received trust patents for lands which were claimed by plaintiffs. The rights of these 16 Indians to their lands were confirmed by the judgment (R. 147). Yet, because of the assumption of jurisdiction to order the equalization of allotments and the apportionment of water, neither the successful Indian defendants nor the other members of the tribe have been able to enjoy fully the fruits of their trust patents. For, shortly after this suit was filed, the attorneys for plaintiffs filed a notice of *lis pendens,* asserting that, if plaintiffs were successful, the attorneys might apply for an equitable lien upon virtually all of the lands of the reservation for the value of legal services performed and costs incurred in this action and also for the value of legal services previously performed for the Indians (R. 87-91). After judgment was entered, the attorneys filed a motion, which was granted in part (R. 155-156; see *supra,* p. 17), alleging that the adjudication as to water rights and the equalization of allotments affects every allotment and inures to the benefit of each allottee, and requesting an order permitting each member to be made a party so that the attorneys could present the question as to the right to

compensation against each Indian (R. 149-151).[12] Ever since the filing of the notice of *lis pendens,* title insurance companies have refused to issue certificates of title and it has been impossible to sell any of the allotted lands without first obtaining a waiver from the attorneys (R. 95-106). The waiver, of course, is not given until the making of a satisfactory escrow agreement for the benefit of the attorneys. Clearly, the 1894 Act did not intend to confer jurisdiction that would so interfere with the management of allotted lands and place successful defendants and other Indians who did not favor the litigation at the mercy of the attorneys. Cf. *Arenas* v. *Preston,* 181 F. 2d 62, 66 (C.A. 9, 1950), certiorari denied, 340 U.S. 819.

And unless the assumption of jurisdiction to equalize allotments and to apportion water is declared to be invalid, it will be a long time before the resulting cloud is removed from the titles of the Indians. This is particularly so with respect to the apportionment of water. Before there can be any allocation of a specific amount of water to each member of the tribe, it must be first ascertained what are the total water rights of the tribe. It is well known that suits to establish water rights are generally long drawn out and expensive. And apparently this one would not be an exception to the rule. Since the Agua Caliente Reservation is checkerboarded (R. 127), it will probably be necessary to bring in the owners of the alternate sections as well as those whites who have purchased Indian lands. Indeed, it will

---

[12] On July 27, 1955, the attorneys filed a motion in the district court seeking an award of fees against every allottee except Lee Arenas and Eleuteria Brown Arenas.

doubtless be necessary to bring in as parties the owners of lands far from the Palm Springs area who have an interest in the underground waters (Plaintiffs' Original Exhibit No. 70, pp. 7, 21). Clearly, the 1894 Act was not intended to confer jurisdiction for litigation of such scope. And if there could be any doubt on that score, it should be resolved in favor of the Indians, the beneficiaries of the Act, by determining that any such suit was beyond the scope of the jurisdiction conferred. Cf. *Arenas* v. *Preston,* 181 F. 2d 62, 66 (C.A. 9, 1950), certiorari denied, 340 U.S. 819.

II

Even Assuming the Existence of Jurisdiction the District Court Erred in Holding That Plaintiffs Were Entitled to the Income Derived from the Lands Included in Their Nonconflicting Allotment Selections from the Dates of Their Selections

The Mission Indian Act of January 12, 1891, 26 Stat. 712, under which the allotment of the Agua Caliente Reservation has been proceeding, contemplated that in the beginning trust patents would be issued to each of the various bands of Mission Indians for their tribal reservations and that at some time in the future the lands would be allotted in severalty and trust patents would be issued to the individual Indians. With respect to the individual trust patents section 5 of the Act provides:

> * * * That these patents, *when issued,* shall override the patent authorized to be issued to the band or village as aforesaid, and *shall separate the individual allotment from the lands held in common,* which proviso shall be incorporated in each of the village patents. [Emphasis added.]

In addition section 8 of the Act provides:

> * * * *Subsequent to the issuance* of any tribal patent, or *of any individual trust patent* as provided in section five of this act, any citizen of the United States, firm, or corporation *may contract with the* tribe, band, or *individual* for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose. [Emphasis added.]

It is plain, therefore, that in view of the quoted statutory provisions the allotting instructions quite properly provided that the trust patents to be issued to those Indians, such as plaintiffs here, who could not rely upon selections made in 1927 "shall be effective as of the date of the issuance thereof" (R. 196).[13] It is

---

[13] In *United States* v. *Arenas,* 158 F. 2d 730, 750, 753 (C.A. 9, 1946), certiorari denied, 331 U.S. 842, this Court held that Lee Arenas was entitled to a trust patent to be effective as of May 9, 1927, the date of his selection. A trust patent was issued to Lee Arenas to conform to the judgment, and the Secretary instructed that the trust patents of all those Indians whose selections appeared on the 1927 schedule, except those foreclosed by the *St. Marie* litigation, should likewise be effective as of May 9, 1927 (R. 195). In *United States* v. *Reynolds,* 250 U.S. 104, 109 (1919), the Supreme Court held that in allotments made under the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. sec. 348, "the trust period begins and dates from the issuance of the trust patent and not from the approval of the allotment." And, it should be noted, the date of the patent in the *Arenas* case was important only in regard to commencement of the trust period. It had no bearing upon income from the property.

also plain that the tribe must have retained some measure of ownership and control of the lands until the issuance of the individual trust patents. For it was the issuance of the individual trust patent, rather than the filing of a selection, which served to "separate the individual allotment from the lands held in common," and until the issuance of an individual trust patent it was the tribe, rather than the individual, that was authorized to make contracts regarding the lands. Thus, until the actual issuance of the individual trust patent, the United States held the lands in trust for the tribe and must also be considered as holding the income from such lands for the same purpose. Hence no matter what equitable rights the individual allottee may have acquired by the virtue of a valid selection, the tribe was entitled to the beneficial use of and income from the lands until the issuance of the individual patent, just as the ordinary vendor under a contract for sale, title to pass at time of conveyance, would be entitled to the beneficial use and income until the legal title passed. See Thompson on Real Property (Perm. Ed. 1940), vol. 8, sec. 4581, p. 527. It is submitted, therefore, that plaintiffs are not entitled to the income derived from their nonconflicting selections during the period between the date of selection and the date on which the trust patent issued.

In reaching a contrary conclusion the district court reasoned (R. 139-140) that equitable title to their nonconflicting allotment selections vested in plaintiffs as of the date of their selections (citing *First Nat. Bank of Decatur, Neb.* v. *United States,* 59 F. 2d 367 (C.A. 8, 1932)) and that, since the issuance of a trust patent is merely a ministerial act (citing *United States* v.

Whitmire, 236 Fed. 474, 480 (C.A. 8, 1916)), plaintiffs are entitled to all the income from such lands from the time of selection. But as we have shown, *supra,* p. 38, the right to income does not follow the equitable title, so that the court's conclusion can not be supported by its premises. Moreover, the conclusion can be reached only by ignoring the fact that the tribe also had equitable rights in the same lands and that the tribe's rights were not to be considered as extinguished until the issuance of the individual trust patents (*supra,* pp. 36-38).

That the tribe's rights in any part of the reservation continued until the issuance of an individual trust patent is, we have shown (*supra,* pp. 36-38), clearly established by the statutory authority for the allotment of the Agua Caliente Reservation. And, inasmuch as allotment statutes have almost limitless variations as to the nature of the rights established, it is clearly erroneous to ignore the pertinent statute and to draw analogies from cases decided under dissimilar allotment statutes, as the court below did (R. 139-140), in determining such an unusual question as the right to income from allotted lands prior to the issuance of trust patents.[14] That this is so becomes apparent from an examination of the cases relied upon by the district court.

In *First Nat. Bank of Decatur, Neb.* v. *United States,* 59 F. 2d 367, 369 (C.A. 8, 1932), it was stated: "Title to the land which defendant confessedly owns was initiated when the individual Indian made selection of and filed upon his allotment of land. That was the in-

[14] In their brief filed in the trial court on March 31, 1954, plaintiffs acknowledged that their research had disclosed no case directly in point. We also have been unable to find a case directly in point.

ception of the title of the Indian allottee, and when the patent was issued it related back to the inception of the title and no further." We have no quarrel with the statement as applied to the allotment of the reservation of the Omaha Indians, which was accomplished under the provisions of Article 6 of the Treaty of March 16, 1854, 10 Stat. 1043, 1044, and the Act of August 7, 1882, 22 Stat. 341, 342-343. But we do deny that it is fully applicable here for the following reasons: The Omaha Tribe did not, as did the Agua Caliente band, have a trust patent covering the lands involved. Rather, prior to the allotting in severalty the Omahas held the land only under "original Indian title" [15] and were not to receive a trust patent until after completion of the allotment process, which patent would cover only lands not allotted in severalty. 59 F. 2d at p. 368; section 8, Act of August 7, 1882, 22 Stat. 341, 342. Thus, in the *First National Bank* case there was not, as here, any question of adjusting equities between the tribe and the individual Indian and the opinion made no mention of equities of the tribe. Inasmuch as the Agua Caliente Tribe's equitable title was not extinguished until the individual allotments were separated from the lands held in common by the issuance of individual trust patents, it is hard to see how the rights of the individual Indians can relate back and thus defeat the tribe's rights to the income earned while it had the equitable title.

Likewise inapposite here is the holding in *United States* v. *Whitmire*, 236 Fed. 474, 480 (C.A. 8, 1916),

---

[15] In *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279 (1955), such "original Indian title" was held not to be a property right. Cf. *Miller* v. *United States*, 159 F. 2d 997, 999-1001 (C.A. 9, 1947).

that the Indian's right to an allotment became absolutely vested upon the filing of his selection and the court's reasoning therefrom that the issuance of a trust patent was merely a ministerial act (R. 139). The *Whitmire* case arose under the Act of July 1, 1902, 32 Stat. 716, providing for the allotment of lands of the Cherokee Nation. As was generally the case in the allotting of lands of the Five Civilized Tribes, that Act provided for the enrolling of all members of the tribe in advance of the allotting process and the issuance of an allotment certificate to each member so enrolled when he made his selection. Section 21 of the Act (32 Stat. at p. 718) declared that the allotment certificate was conclusive evidence of the right of the allottee to the land described therein. See 236 Fed. at p. 480. Under such a statute the issuance of a patent may well be said to be "nothing more than a ministerial act" (R. 139). But the situation under the Mission Indian Act is entirely different. Under that Act there was no provision for determination of entitlement prior to selection.[16] Rather, after the individual Indian had filed his selection, it was still necessary to determine whether he was in fact a member of the tribe and otherwise entitled to an allotment. Such determinations are not ministerial, so that plaintiff's rights can not be said to have vested in the same sense as the rights of the Indian in the *Whitmire* case. The difference between statutes relating to the Five Civilized Tribes and the General Allotment Act in this regard was made clear

[16] It is to be noted that the 1927 instructions for the allotting of the Agua Caliente Reservation provided for the issuance of a certificate of selection for allotment." See *United States* v. *Arenas*, 58 F. 2d 730, 736 (C.A. 9, 1946). There was no such provision in the alloting procedures here involved.

in *United States* v. *Reynolds,* 250 U.S. 104, 108-109 (1919). Clearly, the application of the proper allotment statutes can lead only to the conclusion that plaintiffs had no right to the income from the lands until after the trust patents were issued.

III

Even Assuming Jurisdiction Exists the Court Erred in Holding That It Was the Duty of the Secretary of the Interior and the United States to Apportion or Allot the Tribal Water Among the Individual Indians

We have argued, *supra,* pp. 29-32, that for various reasons the district court had no jurisdiction to make any declaration or adjudication as to the right of the allottees to share in the waters of the reservation. We shall now show that, if jurisdiction in the premises be assumed, the court erred in holding that the plaintiffs were entitled to have apportioned and it was the duty of the United States and the Secretary of the Interior to apportion the tribal water (R. 142-143, 145).

In so holding, the district court relied solely upon Section 7 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 390, 25 U. S. C. sec. 381, which provides:

> That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian

> proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

But this statute plainly contemplates merely the "distribution" of water and not its "apportionment". And as this Court has stated, it is applicable only when the supply of water is insufficient to furnish to each allotment water in an amount "as may be required to irrigate such lands." *United States* v. *McIntire,* 101 F. 2d 650, 654 (C. A. 9, 1939). It is clear, therefore, especially in view of the Congressional policy against the allotment of water in connection with the allotment of lands, *supra,* pp. 30-32, that the statute relied upon did not impose any duty to allocate a specific amount of water to each Indian.

Moreover, it is plain that under the circumstances of the instant case the statute did not even require any action by the Secretary in the "distribution" of water on the Agua Caliente Reservation. First, since, as the court found (R. 127), the reservation lands lie within a resort area and are chiefly valuable for resort purposes, their high value naturally precludes their use for agricultural purposes. At least there is no evidence of any substantial portion of the reservation being devoted to agriculture. But the sole basis for any action by the Secretary under the statute is that such action "is necessary to render lands within any Indian reservation available for agricultural purposes." Secondly, there are presently two systems for the distribution of tribal water, and control over the systems, including the scheduling of use by individual Indians, is exercised by the tribal committee (*supra,* p. 15). There has been no complaint by any Indian that he has not obtained the water he required for irrigation (R. 171-172), so that there

is no necessity for intercession by the Secretary. Consequently, the court's finding (R. 134), that the Secretary was remiss in performing the duties imposed by the statute is clearly erroneous, whether the duty be considered as one of apportionment or distribution.

CONCLUSION

For the foregoing reasons, it is submitted that those portions of the judgment relating to the accounting for income, the equalization of allotments and the apportionment of water should be reversed.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.
LAUGHLIN E. WATERS,
United States Attorney,
Los Angeles, California.
ROGER P. MARQUIS,
JOHN C. HARRINGTON,
Attorneys, Department of Justice,
Washington 25, D. C.

SEPTEMBER, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 356520 271